



December 8, 2004

**VIA ELECTRONIC FILING**

The Honorable Michael K. Powell, Chairman  
The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin  
The Honorable Jonathan S. Adelstein  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

***RE: Ex Parte Comments Regarding Unbundled Access to Network Elements WC Docket No. 04-313, Unbundled Access to Network Elements and CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers***

Dear Commissioners:

NARUC's initial comments in the above captioned proceeding urge the FCC to (i) give substantial deference to NARUC's member comments, (ii) reverse the findings in the FNPRM that seem to either limit State authority to set lower prices for existing elements pursuant to State law or establish uniform increases in prices for elements if the FCC fails to issue a permanent rule, and (iii) reaffirm that State commissions "... are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected."

At its most recent meeting last month in Nashville, Tennessee, the association passed two more resolutions that are relevant to the FCC's action in this proceeding.

The first resolution points out that the record supports, as the FCC has already determined, that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops. That impairment finding was based on evidence that (i) CLECs can not economically self-deploy DS1 loops because it requires the same significant sunk and fixed costs as higher-capacity loops used to serve the largest businesses, yet would result in much lower revenue opportunities, and (ii) there is little evidence of wholesale alternative DS1 loop capacity available to CLEC.

In the permanent order, the FCC should simply reaffirm the *Triennial Review Order* finding of DS1 loop impairment. The finding of impairment for DS1 loops complied with the Act and was clearly supported by substantial evidence. Moreover, the D.C Circuit's *USTAIL* decision does not bar reaffirmation of this impairment determination because the FCC itself made that determination. Elsewhere, the FCC has acknowledged that the USTA II decision only vacated rules concerning mass market switching and dedicated transport.

The FCC also found, however, that evidence of alternative providers at the DS3 and higher capacity levels suggests that there may be specific locations where competitive carriers have deployed fiber and could offer excess capacity at the DS1 loop level.

NARUC believes that small and medium-sized businesses - the customer group served by CLECs using DS1 UNE Loops - are vital to economic growth in the United States. Those businesses will be harmed by a loss of service or by price increases if unbundled DS1 UNE Loops become unavailable to CLECs.

*There were no recorded oppositions to this resolution which specifically "...supports the request for the FCC to reaffirm its prior determination that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops at cost-based rates, unless the ILEC can demonstrate that DS1 loop wholesale alternatives are available at a particular customer location from a provider other than the ILEC or an ILEC affiliate."*

At the same meeting, NARUC passed another resolution making edits to its existing policy on Unbundled Network Elements. The NARUC policy, which indicates that the FCC should establish a minimum set of unbundled elements, and provide State commissions with reasonable flexibility to require additional unbundling if State conditions warrant and do not conflict with the Telecommunications Act, was revised to point out that: "NARUC is open to the possibility that unbundling should be treated as a transitional approach to opening markets, and that the goal should be, for most if not all areas, facilities-based competition." It also indicates that prices for elements should be compensatory to avoid discouraging investment. The full text of the revised policy is attached.

If you have any questions about either of these resolutions, or any other NARUC position, please do not hesitate to contact me at 202.898.2207 or [jramsay@naruc.org](mailto:jramsay@naruc.org).

Sincerely,

James Bradford Ramsay  
NARUC General Counsel

cc: Chris Libertelli  
Matt Brill  
Jessica Rosenworcel  
Daniel Gonzolaz  
Scott Bergmann

***NARUC Telecommunication Policy Resolution (UNE Pricing)***

**WHEREAS**, Pricing unbundled network element at too low a level may discourage investment in new infrastructure and services; *now therefore be it*

**RESOLVED**, That the National Association of Regulatory Utility Commissioners (NARUC), convened in its November 2004 Annual Convention in Nashville, Tennessee, amends the “Current NARUC Telecommunications Policies” Sections 7.10, 7.11, 7.12 as follows:

7.10 Unbundled Elements: The FCC should establish a minimum set of unbundled elements, and it should provide State commissions with reasonable flexibility to require additional unbundling if State conditions warrant and do not conflict with the Telecommunications Act. In addition, the Unbundled Network Element Platform, comprising a combination of unbundled elements, has become an important entry strategy. States should continue to have authority to require unbundling in addition to that required by the FCC's national minimum standard. NARUC is open to the possibility that unbundling should be treated as a transitional approach to opening markets, and that the goal should be, for most if not all areas, facilities-based competition.

7.11 Pricing: Under the law, entrants are granted access to incumbents' network elements and services as one way to compete in the local exchange market. In some rural markets, States will determine if such access is in the public interest. Elements and services should be priced in a manner that encourages competitive entry in the markets in which such entry is appropriate. Prices should, however, be set at levels that are sufficiently compensatory so that they do not discourage investment.

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*Sponsored by the Committee on Telecommunications*  
*Adopted by NARUC November 17, 2004*

***Resolution Regarding Expedited Determination that CLECs are Impaired without DS1 UNE Loops***

**WHEREAS**, On August 21, 2003, the Federal Communications Commission (“FCC”) issued its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (the “Triennial Review Order”) that set forth rules regarding the unbundling of network elements by incumbent local exchange carriers (“ILECs”); *and*

**WHEREAS**, In the Triennial Review Order, the FCC unanimously found that Competitive Local Exchange Carriers (“CLECs”) are impaired in most instances without access to unbundled DS1 loops and that it is not economically feasible for CLECs to deploy their own DS1 loops, unless the ILEC can demonstrate that DS1 loop wholesale competitive alternatives are available at a particular customer’s location from a provider other than the ILEC or an ILEC affiliate; *and*

**WHEREAS**, Various parties appealed the FCC’s Triennial Review Order, and such appeals were consolidated in the United States Court of Appeals for the District of Columbia (D.C. Circuit); *and*

**WHEREAS**, On March 2, 2004, the D.C. Circuit issued a decision in *United States Telecom Association v. FCC* (“USTA II”), vacating and remanding several of the Triennial Review Order’s unbundling rules back to the FCC, and on June 16, 2004, the mandate for the USTA II decision issued; *and*

**WHEREAS**, On August 20, 2004, the FCC issued an Order and Notice of Proposed Rulemaking seeking comments on alternative unbundling rules that will implement the obligations of Section 251(c)(3) of the Communications Act of 1934, as amended, in a manner consistent with the D.C. Circuit Court’s decision in USTA II; *and*

**WHEREAS**, On September 29, 2004, XO Communications, Inc., filed with the FCC a Petition requesting the FCC to bifurcate its consideration of DS1 loops in CC Docket 01-338 and immediately affirm its prior determination that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops; *and*

**WHEREAS**, The FCC has found that it is economically infeasible for CLECs to self-deploy DS1 loops, as such deployment would require the same significant sunk and fixed costs as higher-capacity loops used to serve the largest businesses, yet would result in much lower revenue opportunities; *and*

**WHEREAS**, The FCC has found that there is little evidence of wholesale alternative DS1 loop capacity available to CLEC; however, the FCC found that evidence of alternative providers at the DS3 and higher capacity levels suggests that there may be specific locations where competitive carriers have deployed fiber and could offer excess capacity at the DS1 loop level; *and*

**WHEREAS**, Small and medium-sized businesses - the customer group served by CLECs using DS1 UNE Loops - are vital to economic growth in the United States; *and*

**WHEREAS**, Small and medium-sized businesses have benefited from the availability of competitively-provided services provisioned over DS1 UNE Loops, including access to low-cost high-speed Internet access and advanced voice services; *and*

**WHEREAS**, Small and medium-sized businesses will be harmed by a loss of service or by price increases if unbundled DS1 UNE Loops become unavailable to CLECs, and such harm to these businesses would be damaging to the nation's economy; *now therefore be it*

**RESOLVED**, That the National Association of Regulatory Utility Commissioners (“NARUC”), convened in its November 2004 National Convention in Nashville, Tennessee, supports the request for the FCC to reaffirm its prior determination that the ability of CLECs to provide services is impaired on a nationwide basis unless ILECs are required to make available DS1 UNE loops at cost-based rates, unless the ILEC can demonstrate that DS1 loop wholesale alternatives are available at a particular customer location from a provider other than the ILEC or an ILEC affiliate; *and be it further*

**RESOLVED**, That NARUC’s General Counsel is directed to file in support of this position and take any appropriate actions to further the intent of this resolution.

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*Sponsored by the Committee on Telecommunications*  
*Adopted by NARUC November 17, 2004*